

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	WC Docket No. 02-112
Separate Affiliate and Related Requirements)	
)	

**COMMENTS OF FOCAL COMMUNICATIONS CORPORATION,
PAC-WEST TELECOMM, INC., AND US LEC CORP.**

Richard J. Metzger
FOCAL COMMUNICATIONS CORPORATION
7799 Leesburg Pike
Suite 850 North
Falls Church, VA 22043
(703) 637-8778

John Sumpter
PAC-WEST TELECOMM, INC.
1776 March Lane
Suite 250
Stockton, CA 95207
(209) 926-3300

Wanda Montano
US LEC CORP.
Three Morrocroft Centre
6801 Morrison Blvd.
Charlotte, NC 28211
(704) 319-1074

Richard M. Rindler
Patrick J. Donovan
Paul O. Gagnier
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Counsel for FOCAL COMMUNICATIONS
CORPORATION, PAC-WEST TELECOMM, INC.,
AND US LEC CORP.

Dated: August 5, 2002

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Section 272(f)(1) Sunset of the BOC)	WC Docket No. 02-112
Separate Affiliate and Related Requirements)	
)	

**COMMENTS OF FOCAL COMMUNICATIONS CORPORATION,
PAC-WEST TELECOMM, INC., AND US LEC CORP.**

Focal Communications Corporation (“Focal”), Pac-West Telecomm, Inc. (“Pac-West”), and US LEC Corp. (“US LEC”)(together “Commenters”), by their undersigned counsel, hereby submit these comments in response to the Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.¹ The competition that in theory could serve to safeguard against BOC’s anticompetitive exercise of market power has not developed. In fact, BOC market power and anticompetitive conduct remains fully displayed at the present time, as further discussed herein. Therefore, the Commission should extend the provisions of Section 272 with respect to Verizon’s separate affiliate for New York and for other Verizon and other BOC affiliates as the possible sunset date is reached for the various states in which they have, or will have received, Section 271 approval. If the Commission decides to permit Section 272 safeguards to expire, the Commission should, in addition to other safeguards, first establish performance metrics and reporting requirements to ensure that the Bell

¹ *In re Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Notice of Proposed Rulemaking, FCC 02-148 (rel. May 24, 2002).

Operating Companies (“BOCs”) are not able to exploit their dominance in the local exchange market to compete unfairly against long distance competitors.

Focal Communications Corporation (“Focal”) is a competitive local exchange carrier (“CLEC”) headquartered in Chicago, Illinois. Focal provides facilities-based local exchange service in California, Florida, Georgia, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Texas, and Washington, D.C. Pac-West Telecomm, Inc. (“Pac-West”) is a CLEC headquartered in Stockton, California. Pac-West provides facilities-based local exchange service in Arizona, California, Colorado, Nevada, Utah, and Washington. US LEC Corp. (“US LEC”), headquartered in Charlotte, North Carolina, provides facilities-based local exchange service in Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and Washington, D.C.

I. THE BOCs RETAIN THE INCENTIVE AND ABILITY TO DISCRIMINATE AGAINST THEIR LONG DISTANCE COMPETITORS

In the *Non-Accounting Safeguards Order*, the Commission found that the BOCs possessed market power in the provision of local exchange and exchange access services.² The Commission further concluded that the BOCs’ market power in local markets gave them the incentive and ability to discriminate against unaffiliated long distance carriers in the provision of exchange access services and facilities, and to engage in other anti-competitive behavior. The structural and non-structural safeguards of Section 272(a)-(e) were intended to prevent the BOCs from leveraging their local monopolies into the long distance market.

² *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd 21905, 21911-12 (1996) (subsequent history omitted).

The sunset provision of Section 272(f) was based on the expectation that a BOC would not be granted authority to provide in-region long distance services until its local markets were fully open to competition. It was also assumed that competition would expand following the grant of Section 271 authority. Congress anticipated that competition, rather than the requirements of Section 272, would at some point be adequate to constrain the BOCs' ability to abuse their market power.

Unfortunately, the high hopes of Congress, the Commission, and the competitive telecommunications industry have not been realized. Since enactment of the 1996 Act, the BOCs have used every means at their disposal to slow or prevent the development of robust competition for local services. To name the most recent example, the BOCs have recently sought to impose onerous security deposit and advance payment requirements on CLECs. These requirements would permit BOCs on the basis of vague, non-objective criteria and demonstrably faulty billing to extract millions of dollars from CLECs.³ The fact that BOCs owe CLECs millions of dollars in unpaid charges but that CLECs are unable to impose security deposit requirements on ILECs amply demonstrates BOCs' market power and the continued need for regulation.⁴

To name only a few other examples of continued BOC market power and anticompetitive conduct, BOCs are: raising prices for interstate special access service

³ See Petition to Reject Or Suspend and Investigate filed July 26, 2002 by US LEC Corp. concerning BellSouth Tariff FCC No. 1, Transmittal No. 657.

⁴ See, e.g. Complaint of US LEC of Georgia, Inc., Docket No. 9577-U, *Order*, (Ga. P.S.C. Jun. 16, 2000), *affirmed* BellSouth Telecomms., Inc. v. US LEC of Georgia, Inc., Civil Action No. 1:00-cv-1781-GET (N.D. Ga. 2001); BellSouth Telecomms., Inc. and US LEC, Inc., Docket No. P55, Sub 1027, *Order Concerning Reciprocal Compensation for ISP Traffic*, (N.C.U.C. Feb. 26, 1998); Petition of MCIMetro, *Order Deciding Complaint*, Docket No. 6865-U, (Ga. P.S.C. December 28, 1998); Complaint of MFS Intelenet of Georgia, Inc. *Order Affirming and Modifying the Hearing Officer's Decision*, Docket No. 8196-U (Ga. P.S.C. Dec. 28, 1998); *BellSouth Telecomms., Inc. v. ITC DeltaCom Comms., Inc.*, Civ. Action No. 99-D-287-N, Memorandum Opinion and Order (M.D. Al. Nov. 15, 1999).

where they have been granted Phase II pricing flexibility;⁵ seeking to impose unlawful blanket audits of EEL conversions;⁶ imposing unreasonable interpretations of the standards for EEL conversions;⁷ seeking to compel CLECs through unlawful “no facilities” policies and other practices to purchase higher priced special access service instead of UNEs;⁸ and engaging in unreasonable winback practices.

Apart from these specific examples, the record in the *Non-Dom Proceeding*⁹ amply demonstrates that ILECs continue to possess market power in the local exchange and exchange access market, whether narrowband or broadband services are involved. Moreover, the last 12-18 months has seen the exit of numerous competitive LECs from the marketplace. As a result, the BOCs remain dominant in every state, including those where they have obtained Section 271 authority. As of June 30, 2001, CLECs served only 23% of end-user access lines in New York, and served more than 10% of end-user lines in just a handful of other states.¹⁰

In short, the local competition that could adequately safeguard against BOC anticompetitive behavior has yet to be achieved. The BOCs have maintained, and in some cases increased, their dominance in the local exchange and exchange access

⁵ Comments of the Ad Hoc Telecommunications Users Committee, CC Docket No. 01-321, filed January 22, 2002.

⁶ *Pleading Cycle Established for Comments on NuVox Petition For Declaratory Ruling*, Public Notice, CC Docket No. 96-98, DA -02-32, released June 4, 2002.

⁷ Comments of the Association for Local Telecommunications Services, et al., CC Docket No. 01-338, filed April 5, 2002 p. 95.

⁸ *Id.* p. 103.

⁹ *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360, released December 20, 2002.

¹⁰ Federal Communications Commission, Trends in Telephone Service, May 2002, reprinted at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend502.pdf. The New York Public Service Commission (“NY PSC”) also concluded in a recent proceeding that Verizon New York is dominant in the special services market and routinely discriminates against its competitors. *Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc.*, Case 00-C-2051, Opinion and Order (eff. June 15, 2001), at pp. 5-9.

markets. Nothing else has changed that could curtail the BOCs' incentive and ability to leverage their local market power into the long distance sector. As the BOCs obtain Section 271 authority in more states, the importance of preserving effective competition for long distance increases. This is especially true given the advantages that the BOCs have in winning back long distance customers because of their role as customers' existing local carriers.¹¹ The only effective means to deter the BOCs from favoring their long distance affiliates over competitors is by continuing to require the BOCs to comply with the requirements of Section 272.

II. THE COMMISSION SHOULD EXTEND THE SEPARATE AFFILIATE REQUIREMENT

In enacting Section 272(f), Congress recognized that the local competition that the 1996 Act was intended to foster might not develop. Section 272(f) therefore allows the Commission to extend the structural separation and non-discrimination requirements beyond three years if necessary to preserve competition. For the foreseeable future, the Commission should exercise its authority to extend the protections of Section 272 for all the BOCs because, as discussed, the competition that could render Section 272 safeguards less necessary has not been achieved.

At the same time, it is premature for the Commission to adopt rules of general applicability with respect to the sunset provision of Section 272. Insufficient time has passed since the grant of Section 271 authority to any BOC to assess fully the impact on competition of the BOCs' entry into the long distance market. To date, Verizon and SBC

¹¹ The BOCs that have obtained Section 271 authority have had dramatic success in obtaining long distance market share. Verizon, for example, has 2.4 million long distance customers in New York. "Verizon Investor Quarterly" (Apr. 23, 2002), *reprinted at* <http://investor.verizon.com/financial/quarterly/VZ/1Q2002/1Q02Bulletin.pdf>. SBC has stated that it has a "win back" rate of 50% in states where it has obtained Section 271 approval. "SBC Investor Briefing No. 231" (July 23, 2002), *reprinted at* http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_02_IB_FINAL.pdf.

each have submitted just one biennial audit report under Section 272(d), and the proceedings to examine those filings are ongoing. To Commenters' knowledge, audits have not yet been submitted for any other states. Additional time, market experience, and reporting in a greater number of states are necessary before rules of general applicability could be considered.

For these reasons, Commenters recommend that the Commission for the foreseeable future extend the provisions of Section 272 for all the BOCs. In particular, Verizon's continued dominance in the local exchange and exchange access markets shows that the full local competition that could justify removing the requirements of Section 272 does not yet exist. In addition, the rapid growth of Verizon's share of the long distance market in that state establishes that the Commission should be cautious in taking steps that could limit the Commission's ability to detect whether that growth is the result of improper practices by Verizon.

III. ALTERNATIVELY, THE COMMISSION SHOULD ADOPT PERFORMANCE METRICS AND REPORTING REQUIREMENTS

In the event the Commission determines that the provisions of Section 272 will be permitted to sunset, which it should not do, the Commission should first promulgate performance standards for both UNEs and special access to help ensure that the BOCs do not discriminate against long distance competitors or against CLECs that could provide alternative access arrangements to long distance carriers. The Commission also should implement reporting procedures to monitor BOC compliance with those standards. Specifically, the Commission should adopt performance metrics and standards to ensure that the BOCs' are providing and continue to provide UNEs and special access services

on a nondiscriminatory basis as proposed by Commenters and other parties in the Commission's metrics proceedings.¹²

Given their continued dominance in the local exchange and exchange access markets, the BOCs continue to have the incentive and ability to treat competitive long distance providers in a discriminatory manner, to raise their rivals' costs of providing service, and to provide inferior services and facilities to competitors. By adopting and enforcing meaningful performance standards and reporting requirements, the Commission will be better able to detect and deter actions by the BOCs that intentionally or otherwise discriminate against long distance competitors and CLECs. The Commission also should establish self-effectuating remedies to eliminate the need to commence enforcement proceedings to address BOC misbehavior. Commenters suggest that the performance standards to be adopted in the Commission's ongoing metrics proceeding, combined with reporting requirements and remedy provisions, likely would be appropriate for monitoring the BOCs' compliance with their obligations under the Act.

IV. CONCLUSION

For the foregoing reasons, Focal, Pac-West, and US LEC urge the Commission for the foreseeable future to extend the obligations of Section 272 with respect to BOC long distance affiliates. Alternatively, the Commission should adopt standards and reporting procedures to ensure that BOCs cannot use their dominance in the local

¹² *In re Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, Notice of Proposed Rulemaking, CC Docket No. 01-318, FCC 01-331, released November 19, 2001; *In re Performance Measurements and Standards for Interstate Special Access Service*, Notice of Proposed Rulemaking, CC Docket No. 01-321, FCC 01-339, released November 19, 2001.

exchange and exchange access market to hinder competition in the long distance market as well.

Respectfully submitted,



Richard J. Metzger
FOCAL COMMUNICATIONS CORPORATION
7799 Leesburg Pike
Suite 850 North
Falls Church, VA 22043
(703) 637-8778

John Sumpter
PAC-WEST TELECOMM, INC.
1776 March Lane
Suite 250
Stockton, CA 95207
(209) 926-3300

Wanda Montano
US LEC CORP.
Three Morrocroft Centre
6801 Morrison Blvd.
Charlotte, NC 28211
(704) 319-1074

Richard M. Rindler
Patrick J. Donovan
Paul O. Gagnier
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Tel: (202) 424-7500
Fax: (202) 424-7645

Counsel for FOCAL COMMUNICATIONS
CORPORATION, PAC-WEST TELECOMM, INC.,
AND US LEC CORP.

Dated: August 5, 2002